



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

DEC 10 1992

Honorable Nancy P. Dorn
Assistant Secretary (Civil Works)
Department of the Army
Washington, DC 20310-0130

OFFICE OF
WATER

Dear Ms. Dorn:

In accordance with the provisions of the 1992 Memorandum of Agreement (MOA) between the U.S. Environmental Protection Agency (EPA) and the Department of the Army under Section 404(q) of the Clean Water Act (CWA), I am requesting your review of the decision by Colonel Laurence R. Sadoff, District Engineer, U.S. Army Corps of Engineers (Corps), Sacramento District, to issue a Section 404 permit to Elliott Homes (applicant) for a proposed residential/commercial project (Churchill Downs) located approximately eight miles south of Sacramento, California. The draft permit and decision document were received by EPA on November 5, 1992. The proposed permit would authorize discharges of dredged or fill material into approximately 17 acres of waters of the United States consisting of vernal pools and seasonal wetlands. The proposed permit would provide, in part, after-the-fact permit authorization for unpermitted fill activities conducted during 1987-90 by Elliott Homes which resulted in the filling of 8.7 acres of wetlands, including vernal pools. After a thorough review of available information, EPA has determined that this case warrants elevation in accordance with the criteria in the MOA for elevation under Part IV, Elevation of Individual Permit Decisions.

Aquatic Resources of National Importance

This referral meets the criteria in Part IV based upon EPA's finding that the completed and proposed discharges of dredged or fill material into vernal pools and seasonal wetlands associated with the project would result in substantial and unacceptable adverse effects to aquatic resources of national importance at the Churchill Downs site. Vernal pools and seasonal wetlands are widely recognized as high quality habitat providing unique aquatic functions and values including wildlife habitat for numerous species such as migrating waterfowl and shorebirds in the Pacific flyway, and endangered species habitat. The 1989 Federal Manual for Identifying and Delineating Jurisdictional Wetlands and proposed 1991 revisions recognize the importance of these vital wetland systems as supporting a unique assemblage of plant and animal species that are specifically adapted to the seasonal nature of these ecosystems. In recognition of these characteristics, both the 1989 Manual and 1991 proposed revisions provide special procedures for delineating these ecosystems to ensure their protection as waters of the United States. Nevertheless, vernal pools in the Central Valley of California have



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suffered historical losses of ninety to ninety-five percent, with corresponding impacts to associated aquatic values and functions. Based upon the best available data from the California Department of Fish and Game, a minimum of approximately 3,150 acres of vernal pools remain in the Central Valley of California out of 63,000 acres estimated to have originally existed in the area. As a basis for comparison, a relative loss of prairie potholes wetlands equivalent to the loss of 17 acres of vernal pool complex would equate to 54,000 acres of prairie pothole (based on current estimates of 10 million acres of prairie potholes).

The unique functions and values of the Churchill Downs site are illustrated by the variety of wildlife that are known to inhabit the site, including reptiles and amphibians, birds including waterfowl in the Pacific flyway, mammals, and invertebrates. With regard to invertebrates, two species (the vernal pool tadpole shrimp and the California linderiella) now proposed for listing as endangered under the Endangered Species Act (ESA), are known to occur at the project site. Further, one candidate plant species (Boggs Lake hedge-hyssop) has been found on the project site. Churchill Downs is also within the geographic range of eight candidate plant species currently being considered for possible inclusion in an ESA listing package. Moreover, it is highly likely that the vernal pool fairy shrimp, a species proposed for listing under the ESA, also uses the project site [December 17, 1990 U.S. Fish and Wildlife Service letter and Personal Communication]. Finally, a wetlands functions/values assessment (Wetlands Evaluation Technique), performed by the applicant's consultant at the project site, found the vernal pools on-site rated high for aquatic diversity/abundance and high for uniqueness/heritage.

Substantial and Unacceptable Impacts of the Proposed Discharge

a. Alternatives Analysis

Based on information developed in support of Elliott Homes' application for a CWA Section 404 permit to discharge fill material in waters of the United States at the Churchill Downs site, EPA has concluded that the loss of vernal pool wetlands is unacceptable based, in part, on our concern that compliance with the requirements of Section 230.10(a) of the Guidelines has not been demonstrated. Section 230.10(a) requires that no permit may be issued if "there is a practicable alternative to the proposed discharge that would have less adverse effect on the aquatic ecosystem, so long as such alternative does not have other significant adverse environmental consequences." The record for this proposed permit decision indicates that the District's decision has almost exclusively relied on an alternatives analysis conducted for another project (Elliott Ranch). EPA believes that the Churchill Downs alternatives analysis is based upon inappropriate criteria which has unduly restricted the scope of analysis of potential practicable alternatives. For example, in their analysis of practicable alternatives, the District eliminated off-site alternatives if they were not currently zoned for residential development. Rezoning is a common practice and is often sought in circumstances where developers are seeking to facilitate commercial or residential projects. In fact,

Elliott Homes has stated in their alternatives analysis that rezoning is possible in a substantial portion of the northern and eastern parcels of the Churchill Downs property. Therefore, EPA believes that eliminating potential off-site alternatives based on current zoning is inconsistent with the way EPA and the Corps have considered zoning restrictions in past cases and does not reflect what appear to be valid opportunities to obtain zoning variances in the project area.

The District also eliminated consideration of off-site alternatives if the sites were fragmented or smaller than the proposed site. Yet, there is no information provided by the applicant as to whether the proposed project could be downsized or housing density increased (as may occur in the northern/eastern parcels of the Churchill Downs site) to render an otherwise smaller site practicable. Further, sites were not considered if they contained existing wetlands. However, a comparison of the extent or quality of wetlands on these sites to the preferred site was not conducted and it is not reasonable to assume that all wetlands on these sites would be lost, or that such losses would be more significant than those at the Churchill Downs site. Finally, sites were also eliminated by the District if they were located beyond the "eight mile commute shed" purportedly required by the provisions of the Sacramento County General Plan. The General Plan establishes a policy of reducing air pollution in the Sacramento area by striving to reduce commuting distances and encouraging higher density land uses, among other broad policy objectives. The General Plan does not establish restrictions for locating residential developments, but rather, it proposes goals for reducing commuting distances by encouraging the location of housing near employment centers. The District has not provided any reasons to support why residential development outside the "eight mile commute shed" defined in the Elliott Homes alternatives analysis, would, in fact, not be fully consistent with the clean air objectives of the General Plan.

Available information also indicates that infrastructure costs (i.e., "sunk costs") associated with construction at the site previously filled without CWA authorization have been inappropriately factored into the alternatives analysis. From the documentation provided by the applicant, consideration of these "sunk costs" further limited the review of alternative locations potentially practicable to the applicant. Although the District has stated an adjustment for "sunk costs" was made in the Corps analysis, no supporting documentation is provided in the decision document or other documents provided by the applicant. The "sunk cost" issue is similar to that raised by EPA in its elevation of the Tennessee Department of Transportation (TDOT) permit case on December 13, 1991, and we believe the Sacramento District's decision is inconsistent with the guidance issued by the Department of the Army in the TDOT case.

b. Impacts to Wildlife

EPA also believes that contrary to the requirements of Section 230.10(c) of the Guidelines, the proposed permit decision has not adequately considered adverse impacts to wildlife, including species which are candidates for listing or proposed for listing as

threatened or endangered under ESA. The Sacramento District's decision does not effectively reflect the need to avoid impacts to wetlands on the site used by these species or, where impacts are unavoidable, to identify sufficient mitigation to offset these impacts. The U.S. Fish and Wildlife Service (USFWS) has independently concluded that the District has failed to require the applicant to submit sufficient information regarding impacts to candidate plant species and proposed invertebrate species at the project site [Personal Communication and September 23, 1992, USFWS letter].

Conclusion and Request for Action

EPA is concerned by conclusions reached by the Sacramento District and by the inappropriate analysis used in support of their decision to permit the destruction of over 17 acres of vernal pools and seasonal wetlands at the Churchill Downs site. Our concerns are heightened by the fact that 8.7 acres of wetland losses to be authorized by the proposed permit would be as a result of unauthorized discharges conducted by Elliott Homes during 1987-90. The District's decisionmaking does not appear to consider this illegal activity and provides little or no deterrence for potential future violations.

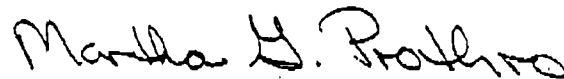
In the review of this project, EPA's principle concern is compliance with the Section 404(b)(1) Guidelines. EPA is seeking guidance from your office that responds to our concerns regarding the manner in which the Sacramento District has conducted its analysis of alternatives in this case. In addition, in response to our concerns regarding project compliance with Section 230.10(a) of the Guidelines, EPA believes that the District should require additional avoidance of the most valuable remaining vernal pool complex wetlands at the site and require additional compensatory mitigation where practicable. In light of the extensive infrastructure development at the site and the impracticability of restoring the functions and values of the filled areas, EPA is not asking that the Corps deny authorization for any of the discharge that has already occurred. We do request that the Corps consider additional avoidance of approximately five acres of vernal pool complex (as part of an additional 60 acre preserve in the northwestern parcel of the property) to reduce project impacts to a level sufficient to protect aquatic resources of national importance. If discharges into these five acres of wetlands are avoided, EPA would not object to issuance of a Department of Army permit to fill approximately 12 acres of wetlands at the site, including approximately 9.6 acres previously filled plus an additional 2.5 acres. EPA also requests compensatory mitigation for the loss of these wetlands by creating new vernal pools and seasonal wetlands at a mitigation ratio of 2.4:1. This ratio has been proposed by the USFWS based on values of the wetlands proposed for filling and in response to the experimental nature of vernal pool creation techniques and unreliable attempts to create vernal pools. In addition, EPA believes that the mitigation is necessary as an appropriate enforcement response to the circumstances involved in this case.

We recognize that the Corps has stated in its decision document that "additional avoidance or mitigation would result in a negative rate of return on investment associated with the project." However, no data or information is provided to support this statement. In the absence of relevant supporting data, there is no reason to believe that additional avoidance and mitigation for the loss of vernal pool wetlands, including wetlands filled without authorization, would not be practicable.

In closing, I want to stress our concern about the nature of aquatic resources that would be impacted by discharges authorized by the proposed permit and the Corps decisionmaking process followed in this case. In this regard, I am confident your review of the record in this case will support our concerns regarding additional avoidance of approximately five acres of vernal pool complex and additional compensatory mitigation and the need to provide guidance to the Sacramento District to address policy concerns. I have enclosed a more detailed analysis of the issues in this matter for your review.

If my staff can be of further assistance during your evaluation of this request, please have your staff direct their questions to Sandy Sieg-Ross in the Wetlands Division at 260-9914. You should also, of course, feel free to contact me or Robert Wayland, Director of the Office of Wetlands, Oceans and Watersheds at 260-7166.

Sincerely yours,



Martha G. Prothro
Acting Assistant Administrator

Enclosures (4)



DEPARTMENT OF THE ARMY
OFFICE OF THE ASSISTANT SECRETARY
WASHINGTON, DC 20310-0103



REPLY TO
ATTENTION OF

11 JAN 1993

Ms. Martha G. Prothro
Acting Assistant Administrator for Water
Environmental Protection Agency
Washington, D. C. 20460

Dear Ms. Prothro:

Thank you for your letter of December 10, 1992, in which you requested higher level review of issues related to a permit application being considered by the Army Corps of Engineers Sacramento District. The project, which is proposed by Elliott Homes, involves the filling of 17.14 acres of wetlands to construct the Churchill Downs development. Your request was made pursuant to Part IV of the 1992 Section 404(q) Memorandum of Agreement (MOA) between the Department of the Army and the Environmental Protection Agency (EPA) regarding review of an individual permit case.

Part IV of the MOA establishes procedures for elevation of specific individual permit cases. To satisfy the explicit requirements for elevation, the permit case must result in unacceptable adverse effects to aquatic resources of national importance.

We have carefully reviewed the concerns raised in your letter and the Sacramento District's decision documents for this case. Our review included a joint teleconference with your wetlands staff, the District, and the EPA Region IX staff. Based on our evaluation, we agree that over 50 percent of the vernal pools on the 640-acre project site would qualify as aquatic resources of national importance (ARNI). The vernal pool complexes located within the site that, in our opinion, qualify as an ARNI are limited to the areas where concentrations of deeper vernal pools are interconnected and contain high plant diversity. This is consistent with our belief that all types of aquatic resources, including vernal pools, have functions and values that vary in degree of importance. The district's proposed decision requires avoidance and preservation of these areas as well as the surrounding uplands. Specifically, 22 acres of avoided ARNI vernal pools will be preserved along with an additional 115 acres of vital associated uplands that support these wetlands. The remaining 17.14 acres

of wetlands on the site have been determined to be of substantially lower resource value and would not constitute an ARNI. These areas, which have been partially impacted by past agricultural activities, do not have the same density, depth, and plant and animal diversity as the 22 acres considered an ARNI. In light of the avoidance and preservation of the ARNI wetlands, we have determined that additional case-specific guidance pursuant to Part IV of the MOA is not necessary or appropriate. In this regard, I will direct the district to proceed with a final permit decision consistent with Part IV, paragraph 3(h) of the MOA.

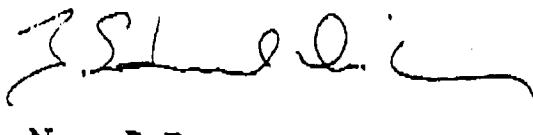
We do not believe that it would be appropriate or practicable to require the additional five acres of non-ARNI wetlands avoidance noted in your letter. To do so would require an additional 60 acres of uplands which would render the project inviable. In addition, we believe that the district has fully considered the impact of the project on candidate endangered species. The district will continue to work with the U. S. Fish and Wildlife Service to ensure compliance with the Endangered Species Act.

I want to assure you that the Department of the Army shares your concerns over the protection of the Nation's valuable aquatic resources, including vernal pools. We believe the district's decision recognized the importance of the vernal pools that constitute an ARNI and appropriately avoided such areas. Further, the district required that the applicant reduce the wetlands fill area by approximately 40 percent and increase the total area preserved by over 320 percent. Although it was determined that the functions and values of the resource were lower (i.e., non-ARNI), the district required off-site mitigation designed to create wetlands of higher quality and quantity than those destroyed by the permitted fill. The off-site mitigation will involve creating and restoring 22.63 acres of wetlands with an additional 65 acres of preserved contiguous uplands. Based on the comprehensiveness of the district's mitigation requirements, including the selection of an off-site area that once exhibited vernal pools and has the necessary underlying clay layer, we believe that overall wetlands functions and values will be enhanced. We have discussed with the district the importance of complete success of the mitigation plan. A summary of the mitigation proposed by the applicant and that to be required by the district is provided in the enclosed table.


The additional issues raised in your letter are not addressed in this response since additional Part IV case-specific guidance is not required. However, we would be pleased to discuss issues such as practicable alternatives pursuant to Part III of the MOA. Mr. Michael Davis, my Assistant for Regulatory Affairs, will contact your staff to schedule a meeting for such discussions.

Your interest and efforts in raising this case to our attention are appreciated. We are fully committed to working with EPA in efficiently and effectively administering the regulatory program. EPA's important role in the program is recognized and will continue to be acknowledged by Corps field offices. Should you have any questions or comments concerning the Elliott Homes permit elevation, or the program in general, do not hesitate to contact me or Mr. Davis at (703) 695-1376.

Sincerely,

for 
Nancy P. Dorn
Assistant Secretary of the Army
(Civil Works)

Enclosure


G. Edward Dickey
Acting Principal Deputy Assistant Secretary
(Civil Works)



DEPARTMENT OF THE ARMY
U.S. Army Corps of Engineers
WASHINGTON, D.C. 20314-1000

12 JAN 1993

REPLY TO
ATTENTION OF:

CECW-OR

MEMORANDUM THRU COMMANDER, SOUTH PACIFIC DIVISION
FOR COMMANDER, SACRAMENTO DISTRICT
SUBJECT: Request for Permit Elevation, Elliott Homes

1. On 11 January 1993 the Assistant Secretary of the Army (Civil Works) (ASA(CW)) responded (copy enclosed) to the request by the Environmental Protection Agency (EPA) for elevation of the U. S. Army Corps of Engineers Sacramento District's proposed decision to issue a permit pursuant to Section 404 of the Clean Water Act to Elliott Homes. The project involves the filling of 17.14 acres of wetlands for the construction of the Churchill Downs development.

2. The EPA's request was made pursuant to Part IV of the Section 404(q) Memorandum of Agreement (MOA) between the Department of the Army and EPA regarding review of an individual permit case. The main issues presented by the EPA for our consideration pertained to impacts to aquatic resources of national importance, alternatives analysis under the Section 404(b)(1) Guidelines, and impacts to potential and candidate Federal threatened and endangered species.

3. The ASA(CW) letter advised the EPA that the request for elevation under Part IV did not meet the test established in the MOA for Headquarters to provide guidance to the District or otherwise alter the District's decision. This determination was based upon the fact that the two-prong threshold, regarding unacceptable adverse effects (i.e., after considering mitigation) to aquatic resources of national importance, was not met. The ASA(CW) did agree with the EPA that aquatic resources of national importance are located within the site. However, the District has appropriately recognized these areas and required avoidance and preservation. The District also required off-site mitigation for wetland areas of lesser value that involves creation and preservation of vernal pools and seasonal wetlands comparable to those avoided and preserved on-site. The District's evaluation resulted in a decision in which no unacceptable adverse impacts to aquatic resources of national importance will occur. The District's proposed decision has adequately addressed all issues

CECW-OR

SUBJECT: Request for Permit Elevation, Elliott Homes

regarding wetland impacts and we are advising the District to proceed to a final permit decision for Elliott Homes, pending resolution of the Department of the Interior's action pursuant to its Section 404(q) MOA.

4. If you have any comments or questions, please contact Mr. Victor Cole at (202) 272-0201.

Encl



STANLEY G. GENECA
Brigadier General (P), USA
Director of Civil Works



United States Department of the Interior

OFFICE OF THE SECRETARY
WASHINGTON, D.C. 20240

MAR 16 1993

Honorable G. Edward Dickey
Acting Assistant Secretary (Civil Works)
Department of the Army
Washington, D.C. 20310

Dear Dr. Dickey:

In accordance with the provisions of the section 404(q) Memorandum of Agreement (MOA) between the Department of the Interior and the Department of the Army, as revised on December, 21, 1992, I am requesting your review of the Corps of Engineers, Sacramento District (District) Engineer's decision to issue a section 404 permit for the project described in Public Notice No. 199000126. This "after-the-fact" permit would authorize the applicant, Elliott Homes, to retain fill material and discharge additional fill in wetlands to construct residential housing and support infrastructure at the 640-acre Churchill Downs project site in central Sacramento County, California. The proposed project would ultimately result in the loss of 17.14 acres of vernal pools and other seasonal wetlands.

On February 9, 1993, the District notified the U.S. Fish and Wildlife Service (Service) of their intent to proceed with permit issuance. After a thorough review of background information on the project, I have determined that this case warrants elevation in accordance with the criteria found in Part IV of the revised section 404(q) MOA (Elevation of Individual Permit Decisions). That is, I have concluded that the proposed project will have substantial and unacceptable adverse effects on aquatic resources of national importance, even after considering proposed mitigation.

I am concerned that the District Engineer's proposed permit decision will allow the loss of additional wetlands on the project site which support imperiled and other important invertebrate species, provide habitat of high value to migratory and resident birds and other wildlife species, and may also support rare plant species. The Department of the Interior, acting through the Service, is vested with the authority and obligation to protect, conserve and enhance the Nation's fish and wildlife resources. These matters fall within our jurisdiction under the Fish and Wildlife Coordination Act, section 404(m) of the Clean Water Act, the Fish and Wildlife Act of 1956, the Endangered Species Act of 1973, as amended, and the Migratory Bird Treaty Act, as amended to implement international treaties regarding the conservation of migratory bird populations.

I have concluded that the proposed project will have an adverse impact on vernal pools and associated seasonal wetlands, which I have determined to constitute aquatic resources of national importance. Originally, about 4.2 million acres of vernal pool complexes are estimated to have occurred in California's Central Valley. However, agricultural conversion, flood control

projects, and residential/commercial development activities have eliminated more than 90 percent of the original vernal pool wetland base. Recent data compiled by the California Department of Fish and Game's Natural Diversity Database suggest that as little as 30,000 to 40,000 acres, or as little as one percent, of the Central Valley's original vernal pool complexes may remain. A decline in the abundance and diversity of plant and animal species associated with vernal pools has accompanied this wetland loss, which has been exacerbated by habitat fragmentation and the loss of dispersal corridors. In light of these trends, the loss of additional vernal pools and associated species due to the construction of non-water dependent residential housing becomes a substantial and, in my view, unacceptable adverse impact on a wetland ecosystem whose physical and biological functions have already been severely impaired.

Vernal pools on the project site support numerous invertebrate species, including California linderiella (*Linderiella occidentalis*) and vernal pool tadpole shrimp (*Lepidurus packardii*), two freshwater invertebrate species proposed for listing as endangered under the Endangered Species Act. These animals are found in vernal pools remaining on the project site, including pools that would be filled with permit issuance. The site's vernal pools are also likely to support the vernal pool fairy shrimp (*Branchinecta lynchi*), another freshwater invertebrate species proposed for listing as endangered. However, surveys by the applicant's environmental consultant have not been sufficient to determine its presence or absence. The site's remaining vernal pools provide winter resting and feeding habitat for Pacific Flyway migratory birds, particularly waterfowl and shorebirds. Mallards, green-winged teal, greater yellowlegs, and killdeer have been observed in the site's vernal pools. Wading birds, including great blue herons and egrets, are also found on the site. The vernal pool complexes support pocket gophers, mice, and jackrabbits which serve as prey for foraging raptors such as Cooper's hawks, American kestrels, and red-tailed hawks. In addition, the site's pools support the aquatic phases of several amphibians, including western toads and Pacific treefrogs.

Botanical surveys in the project area have revealed the presence of Boggs Lake hedge-hyssop (*Gratiola heterosepala*), a candidate for Federal listing. Several additional plant candidate species which are currently being considered for possible inclusion in a listing package of plant species restricted to vernal pools may also occur on the site, but adequate surveys have not been conducted to determine their presence or absence. The site's vernal pools, including pools outside the District's proposed preserves, contain a high diversity and abundance of plant species which are typically confined to this unique aquatic habitat type.

I have reviewed the Department of the Army's January 11, 1993, response to the Environmental Protection Agency's elevation of the same project proposal, and your decision to exclude vernal pools and seasonal swales outside the District's proposed preserves from classification as aquatic resources of national importance. Although I agree with your assessment of the value of the wetlands to be protected within the proposed preserves, I find that the vernal pools and seasonal swales remaining outside the proposed preserves must also qualify as aquatic resources of national importance, since there is clear

evidence that the biological values of the pools in these two areas cannot be distinguished on the basis of density, size, or depth, as determined in your response to the Environmental Protection Agency. Moreover, there is no biological basis for implying that the wetlands outside the proposed preserves are of lower biological value. On the contrary, the Department has determined that these wetlands support a diverse assemblage of unique vernal pool plants and invertebrates, including two proposed endangered animal species. I believe that all Federal agencies, including the Corps of Engineers, have an obligation under the Endangered Species Act to take positive steps to conserve imperiled species and their habitats, above and beyond the Act's requirements to avoid jeopardizing the continued existence of proposed and listed species.

Finally, the Department does not concur with the District's determination that information sufficient to assess project impacts on candidate plant and proposed animal species, and design adequate compensatory mitigation, has been collected and analyzed. We also do not concur with the District's contention that vernal pools can be created offsite to replace the original biological conditions found in natural pools. Although permit conditions may have been met for some past projects, this only demonstrates compliance with permit conditions, not full restoration of biological functions and values. We believe that considerably more baseline information is needed to accurately assess impacts on these species, and that avoidance of vernal pools is the only proven strategy for preserving their unique edaphic features, and biological functions and values. Accordingly, we have repeatedly recommended to the District that vernal pools in the project area be avoided, and that compensatory mitigation be implemented for wetlands the applicant has already filled without authorization.

In conclusion, I recommend that the District deny issuance of an "after-the-fact" section 404 permit for the Churchill Downs project unless the following issues are addressed and included as permit special conditions:

1. Important plant and wildlife resources remaining on the site will be preserved by requiring additional avoidance of project area wetlands. The onsite preserve in the northwest portion of the project area will be expanded to include those vernal pools and seasonal wetlands identified by the Department of the Interior as aquatic resources of national importance.
2. Compensatory mitigation will be confined to replacing lost habitat values from the already-filled wetlands and the few remaining wetlands that would be filled outside the expanded preserves.
3. Onsite compensation within the expanded preserves will be evaluated as an alternative to offsite compensation. Any compensatory mitigation, either onsite or offsite, will be determined in consultation with the Service.
4. Adequate baseline information will be required for all plant and wildlife resources, particularly plant candidate and animal proposed species, on the site. Performance standards and success criteria will be developed which target the affected species. This information will be reviewed by the Service prior to issuing a permit for the project.

Honorable G. Edward Dickey

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Enclosed is additional information addressing these and other issues relating to the proposed permit decision. I request your review of the decision by the District Engineer to issue the permit to Elliott Homes based on the information used, and procedures followed, in reaching the decision to proceed with permit issuance.

Sincerely,

Joseph C. Goddard
Acting Assistant Secretary for Fish
and Wildlife and Parks

Enclosure



DEPARTMENT OF THE ARMY
OFFICE OF THE ASSISTANT SECRETARY
WASHINGTON, DC 20310-0108



REPLY TO
ATTENTION OF

14 APR 1993

Mr. Joseph E. Doddridge
Acting Assistant Secretary for Fish
and Wildlife and Parks
U. S. Department of the Interior
Washington, D. C. 20240

Dear Mr Doddridge:

Thank you for your letter of March 15, 1993, in which you requested higher level review of issues related to a permit application being considered by the Army Corps of Engineers Sacramento District. The project, which is proposed by Elliott Homes, involves the filling of 17.14 acres of wetlands to construct the Churchill Downs development. Your request was made pursuant to Part IV of the 1992 Section 404(q) Memorandum of Agreement (MOA) between the Department of the Army and the Department of the Interior (DOI).

Part IV of the MOA establishes procedures for elevation of specific individual permit cases. To satisfy the explicit requirements for elevation, the permit case must pass two tests: 1) the proposed project would occur in aquatic resources of national importance (ARNIs), and 2) the project would result in unacceptable impacts to ARNIs.

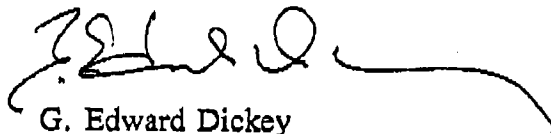
We have carefully reviewed the concerns raised in your letter and the Sacramento District's decision documents for this case. Our review included a joint on-site meeting with U. S. Fish and Wildlife Service (FWS) staff, the District, the applicant and several wetlands consultants. Based on our evaluation we have concluded that the majority of vernal pools on the Churchill Downs site qualify as ARNIs, including the approximately five acres adjacent to the on-site preserve in the northwest portion of the project area. Therefore, the first part of the ARNI test has been met. We recognize that including these additional five acres as ARNIs, while appropriate, is inconsistent with our previous determination in the Environmental Protection Agency's (EPA) request for elevation on this case. However, our field visit and additional discussions with vernal pool experts lead us to conclude that there is no significant ecological difference between the areas that we originally designated ARNIs and the five acres that remain in question. In future Section 404(q) MOA elevation requests, a Washington level representative of this office will conduct an on-site meeting with appropriate parties.

Regarding the second part of the ARNI test, we have concluded that sufficient questions remain concerning the restoration and creation of vernal pools to warrant additional evaluation before a final determination on the impacts to filling the additional five acres of ARNI vernal pools can be made. In addition, as explained below, further evaluation of the practicability of avoiding the five acres is also required.

In light of the above, we will give the District guidance, pursuant to MOA Part IV, Paragraph 3(g)(2), that must be utilized in reaching a final permit decision. This guidance will include: 1) a requirement to reevaluate the practicability of avoiding impacts to the approximately five acres of vernal pools and 60 acres of associated uplands in northwest part of the property adjacent to the applicant's proposed preservation area. This reevaluation is particularly important in light of new information concerning the potential for rezoning and a subsequent increase in the number of housing units allowed within the northwest portion of the site; 2) a requirement to reevaluate the compensatory mitigation plan (if it is determined that it is not practicable to avoid vernal pools) based on input from the Corps Waterways Experiment Station, FWS, EPA, and non-Federal vernal pool experts. Special attention will be given to the development of success criteria, monitoring protocols and impacts to candidate species. Based on the final plan all compensatory mitigation for impacts to ARNI vernal pools at the Churchill Downs site will be completed and monitored for a minimum of two years before filling of the ARNI pools can occur. We will provide you a copy of the specific guidance provided to the Sacramento District as soon as it is finalized.

Your interest and efforts in raising this case to our attention are appreciated. We are fully committed to working with DOI in efficiently and effectively administering the regulatory program. Should you have any questions or comments concerning the Elliott Homes permit elevation, or the program in general, do not hesitate to contact me or Mr. Michael Davis, my Assistant for Regulatory Affairs, at (703) 695-1376.

Sincerely,

A handwritten signature in dark ink, appearing to read 'G. Edward Dickey', with a long horizontal flourish extending to the right.

G. Edward Dickey
Acting Assistant Secretary of the Army
(Civil Works)



DEPARTMENT OF THE ARMY

U.S. Army Corps of Engineers
WASHINGTON, D.C. 20314-1000

27 APR 1993

REPLY TO
ATTENTION OF:

CECW-OR

MEMORANDUM THRU COMMANDER, SOUTH PACIFIC DIVISION

FOR COMMANDER, SACRAMENTO DISTRICT

SUBJECT: Request for Permit Elevation, Elliott Homes

1. On 14 April 1993, the Acting Assistant Secretary of the Army (Civil Works) responded (encl) to the request by the Department of the Interior (DOI) for elevation of the U.S. Army Corps of Engineers Sacramento District's proposed decision to issue a permit to Elliott Homes pursuant to Section 404 of the Clean Water Act.
2. The DOI request was made pursuant to Part IV of the Section 404(q) Memorandum of Agreement between the Department of the Army and the Department of the Interior regarding review of an individual permit case. The main issues presented by the DOI for our consideration were based on their conclusion that unacceptable substantial adverse impacts to aquatic resources of national importance would occur. These included adequacy of the compensatory mitigation, alternatives analysis and impacts to potential and candidate Federal threatened and endangered species.
3. The Acting Assistant Secretary of the Army (Civil Works) letter advised the DOI that they concurred with the DOI that the five acres of vernal pools in question were aquatic resources of national importance. The Acting Assistant Secretary of the Army (Civil Works) further advised that additional guidance would be provided to the District in accordance with Part IV, paragraph 3(g)(2) of the Memorandum of Agreement.
4. The District, prior to reaching a final decision, shall reevaluate fully the practicability of avoiding impacts to the approximately five acres of vernal pools and 60 acres of associated uplands in the northwest part of the property adjacent to the applicant's proposed preservation area. It appears that it may in fact be practicable to avoid such areas. This is particularly true in light of new information concerning the potential for rezoning to increase the number of housing units allowed within the northwest portion of the site.
5. The District shall also reevaluate the compensatory mitigation plan (if it is determined that it is not practicable to avoid the five acres of vernal pools) based on input from the Corps Waterways Experiment Station, Fish and Wildlife Service,

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Environmental Protection Agency, and non-Federal vernal pool experts. Special attention must be given to developing success criteria, monitoring protocols and impacts to candidate species. Based on the final plan, which should be incorporated into the permit, all compensatory mitigation for impacts to aquatic resources of national importance vernal pools at the Churchill Downs site must be completed and monitored for a minimum of two years before filling of the aquatic resources of national importance pools can occur. This should not substantially impact the applicant since he has indicated that he does not plan to complete the development for approximately eight years. In addition, the permit will allow the applicant to develop other parcels of the property. This approach, however, will allow the applicant to demonstrate more completely the success of vernal pool compensatory mitigation and will potentially afford such mitigation more credibility with the Corps, resource agencies and the environmental community.

6. We recognize the need for additional information to facilitate future evaluations for projects which may impact vernal pools. The division will request assistance from the Waterways Experiment Station to perform an analysis of selected vernal pool mitigation sites within the division. The Corps will also sponsor a workshop to develop general criteria regarding vernal pool mitigation for future decisions. Please contact our office if you need assistance to facilitate the Waterways Experiment Station review of this matter.

7. To be consistent with information obtained through the scientific evaluation identified in paragraphs 5 and 6 above, we recommend that the District encourage the applicant to aggressively pursue his effort to create a mitigation bank. The District's coordination of this effort should include State and Federal resource agencies and, to the degree practicable, acknowledged vernal pool experts. The applicant indicated that sufficient land was acquired to develop mitigation for future projects. Early development of the mitigation bank would allow sufficient time to demonstrate the effectiveness of vernal pool restoration/creation prior to impacts associated with future permitted activities.

8. If you have any comments or questions, please contact Mr. Victor Cole at (202) 272-0201.

Encl


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Director of Civil Works